

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 2, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP281-CR

Cir. Ct. No. 2011CF699

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AUSTIN J. SINGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: TAMMY JO HOCK, Judge. *Reversed and cause remanded for further proceedings.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Austin Singer appeals a judgment of conviction for delivery of heroin and an order denying his motion for postconviction relief. Singer argues the circuit court erroneously exercised its sentencing discretion and

relied on inaccurate information at sentencing because an aggravating factor was not supported by the evidence. We agree the court erroneously exercised its sentencing discretion. We therefore reverse the judgment and order and remand for resentencing.¹

BACKGROUND

¶2 Singer was initially charged with first-degree reckless homicide, as party to a crime, after Kyle Sweney died from a drug overdose. An amended complaint alleged the following facts.

¶3 Sweney lived in an apartment with Jeffrey Malitz. On February 1, 2011, Sweney gave Emerson Reed money to buy some crack cocaine. Reed returned later that day with crack and two “bindles” of heroin, explaining he could not get as much crack as Sweney wanted. Reed had been trying to convince Sweney to do heroin throughout the day.

¶4 Malitz, Reed, and Sweney used the crack cocaine. Reed and Sweney then wanted to use the heroin, so Sweney called Singer to come show them how to cook it. Singer helped cook the heroin and assisted Sweney with tying his arm with a tourniquet. Singer then injected heroin into Sweney’s arm with a needle. Malitz observed Sweney was “all messed up” after the heroin injection. Singer left the apartment, while Reed snorted heroin before leaving. Sweney passed out on his bed.

¹ Singer also argues that he is entitled to resentencing because the State breached the plea agreement, and that the court erroneously ordered restitution. Because we remand for resentencing on other grounds, we need not reach these arguments. *See State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

¶5 The next morning, Malitz entered Sweney’s room between 10:00 and 11:00. Sweney was in his bed and breathing. Sweney’s father arrived at the apartment around 1:30 p.m. to check on him and was unable to wake him. An officer arrived fifteen minutes later and observed Sweney’s chest appeared to be moving slowly, but the officer was unable to detect a pulse. Sweney was transported to a hospital, where he was later pronounced dead.

¶6 Doctor Mark Witeck, a forensic pathologist, prepared Sweney’s autopsy report. Urine and blood tests indicated the presence of amphetamine, THC, and metabolites of cocaine and heroin. As Witeck later explained at the preliminary hearing, he concluded Sweney died of poly substance toxicity—multiple drugs working together to cause a person’s death. Witeck was unable to give an opinion as to when Sweney took the cocaine, heroin, or amphetamine. He explained, “The toxicologist might be able to help with that but that’s beyond my normal scope.” Witeck also acknowledged the cocaine alone could have caused Sweney’s death, again deferring to the toxicologist.

¶7 Singer ultimately pled guilty to an amended charge of manufacture/delivery of heroin, as party to the crime. At the plea hearing, the prosecutor stated, “The one significant factor that had been discussed by the parties and the State feels this is a part of the agreement is the State will be able to argue [Sweney’s] death ... as an aggravating factor.”

¶8 Prior to Singer’s sentencing hearing, Sara Schreiber, a forensic toxicologist with the Wisconsin state crime lab, wrote a letter to the court. Schreiber indicated “[t]here is no way to tell with any degree of reasonable certainty whether a dose of heroin, ingested between 11:00 p.m. and 1:00 a.m. on the night of February 1-2, 2012, was a substantial factor in causing ... Sweney’s

death.” Schreiber further opined that it was possible Sweney used heroin after that time and that it was unlikely that a particular heroin metabolite would be detectable twelve hours after a single injection.

¶9 Singer also provided the court a letter from James Oehldrich, an independent forensic toxicologist. Oehldrich opined that a dose of heroin between 11:00 p.m. and 1:00 a.m. on the days in question could not have caused Sweney’s death, and that his body would have eliminated the heroin and heroin metabolites from his blood. His professional opinion was that Sweney injected heroin at least once after 1:00 a.m.

¶10 Schreiber testified at the sentencing hearing consistent with her letter, and the parties argued regarding Sweney’s cause of death. The State contended “the fact that ... Sweeney died as a result of this transaction” was an aggravating factor. Singer emphasized his due process right to be sentenced based on accurate information and argued the evidence did not support a conclusion that his conduct caused Sweeney’s death. In fashioning Sweney’s sentence, the circuit court explained:

And one of the things that seems difficult for ... Singer to acknowledge is that he injected ... Sweney. He doesn’t seem willing to admit that that was his role. ...

One of the things that has been argued at some great length here is the causation of death and whether ... Singer had any role in that causation. ...

And I think what really needs to be looked at in determining the serious nature of the offense is, number one, there is an aggravating factor here. There is the death of ... Sweney. And whether ... you want to admit that ... Singer was involved in that, the delivery of heroin is a horrifically dangerous crime. It is such a dangerous and addictive drug. And it does result in death.

This state, this country is marked with almost an epidemic type of result of people using heroin. There are heroin overdose deaths all the time. And that needs to be taken into consideration when one is delivering heroin. And that's the charge that ... Singer has pled to. That's the charge that he has been convicted of. And there was found to be a sufficient factual basis to substantiate that charge.

....

His actions, his decision to deliver heroin, those are the actions that bring him before the Court. Whether or not you want to believe that those actions resulted in the death of ... Sweney, he certainly was involved in injecting ... Sweney with heroin. And as I already indicated, that's a very, very significant type of offense with devastating consequences obviously that happened. And which clearly whether or not you want to believe it was ... Singer's delivery of heroin that killed ... Sweney, it certainly highlights how dangerous the actions of delivering heroin really are.

¶11 Singer faced a maximum possible sentence of twelve and one-half years' imprisonment. The court ultimately imposed the sentence requested by the State, which was eight years' imprisonment, including three years' initial confinement.² Singer moved for resentencing, arguing the circuit court erroneously relied on Sweney's death as an aggravating factor. The court denied the motion, explaining:

The State did present evidence that ... Singer's conduct caused ... Sweney's death through the Criminal Complaint, through the arguments that were presented. And I ... find from reviewing the record that the State presented evidence such that the Court could ... find that [Singer] was responsible for the death of ... Sweney.

Singer appeals.

² Incidentally, this was the same sentence the court ordered for Reed, who pled guilty to second-degree reckless homicide.

DISCUSSION

¶12 Singer argues that the circuit court erroneously exercised its discretion, and/or that the court relied on inaccurate information, when the court considered as an aggravating factor that Singer's conduct was a substantial factor contributing to Sweney's death. We agree the court erroneously exercised its sentencing discretion because the evidence did not reasonably support the conclusion that Singer caused Sweney's death.

¶13 The pronouncement of a sentence is an exercise of the court's discretion. *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). Thus, we review sentences for erroneous exercise of that discretion. *Id.* at 278. “The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.” *Id.* at 276 (source omitted). “When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion.” *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. Additionally, “a defendant ... has a due process right to be sentenced on the basis of accurate information.” *State v. Anderson*, 222 Wis. 2d 403, 412, 588 N.W.2d 75 (Ct. App. 1998).

¶14 In a case involving a guilty plea, “the sentencing undoubtedly is the most critical phase of the proceeding.” *Id.* at 411. Accordingly, “the trial court has an important fact-finding role to perform if facts relevant to the sentencing decision are in dispute. In that setting, the sentencing court must resolve such disputes.” *Id.* at 412. However, a sentencing proceeding need not be conducted with the same evidentiary formality of a trial. *Id.* at 411. In Wisconsin, there is no specific burden of proof as to facts bearing upon a sentence. *State v. Hubert*,

181 Wis. 2d 333, 345, 510 N.W.2d 799 (Ct. App. 1993). “[T]he present law[,] which places all sentencing under the standard of judicial discretion[,] remains the more practical and workable rule for both the trial court when imposing a sentence and the appellate court when reviewing a sentence.” *Id.* “If our review of the record indicates that ... the facts of record fail to support the circuit court’s decision, the circuit court erroneously exercised its discretion.” *State v. Ringer*, 2010 WI 69, ¶24, 326 Wis. 2d 351, 785 N.W.2d 448.

¶15 We first observe that the State never alleged Singer assisted Sweney in obtaining any drugs in the first instance. Rather, the only alleged facts supporting Singer’s plea to manufacture/deliver heroin were that he helped “cook” Sweney’s heroin, applied a tourniquet to Sweney’s arm, and injected the heroin into Sweney with a needle. Thus, as an initial matter, the circuit court could not have reasonably concluded that Sweney died from using drugs that Singer supplied.

¶16 Prior to and at the sentencing hearing, evidence was presented regarding the cause of Sweney’s death. Witeck, the forensic pathologist, opined Sweney died of poly substance toxicity, based on the discovery of amphetamine, heroin, and cocaine in Sweney’s system. However, Witeck was unable to give an opinion as to when Sweney took any of those drugs. Rather, he deferred to toxicologists on that question. The state crime lab’s toxicologist explained “[t]here is no way to tell with any degree of reasonable certainty whether a dose of heroin, ingested [the night before] was a substantial factor in causing ... Sweney’s death.” She also believed it would be unlikely that a particular heroin metabolite would be detectable twelve hours after a single injection. Singer’s independent toxicologist, Oehldrich, opined that the injection in which Singer assisted could not have caused Sweney’s death, and that Sweney must have used heroin

following that incident because the heroin metabolites would no longer have been present from the initial injection.

¶17 At sentencing, the State presented no additional scientific evidence refuting the three experts' opinions. The court made no explicit findings regarding Oehldrich's and Schreiber's opinions, or Witeck's testimony that he would defer to a toxicologist's findings. In any event, given the expert evidence provided, the trial court could not reasonably conclude that the injection of heroin with which Singer assisted was a contributing factor in causing Sweney's death the next day.³ Thus, the court erroneously exercised its sentencing discretion. See *Ringer*, 326 Wis. 2d 351, ¶24. We therefore remand for resentencing.

By the Court.—Judgment and order reversed and cause remanded for further proceedings.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

³ In its response brief, the State never acknowledges, much less addresses, the expert toxicologist evidence. Rather, it merely asserts the court “could draw its own conclusions based on [the] information [about Sweney's death]. Simply because Singer disputes some of the court's conclusions, does not mean that the information was inaccurate.” The State's response is so inadequately developed that we deem it a concession of the issue. See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). The State also contends any error was harmless. However, this argument also ignores the expert testimony, and even relies on the fact the court considered Sweney's death to be an aggravating factor. We do not find the argument adequate or persuasive. The court's consideration at sentencing of other, proper factors did not negate the court's error.

